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UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

FREEDOM FROM RELIGION FOUNDATION, INC., a Wisconsin non-profit corporation, VALLEY OF THE SUB CHAPTER OF THE FREEDOM FROM RELIGION FOUNDATION, an Arizona non-profit corporation, MIKE WASDIN, an individual, MICHAEL RENZULLI, an individual, JUSTIN GRANT, an individual, JIM SHARPE, an individual, FRED GREENWOOD, an individual, CRYSTAL KESHAWARZ, an individual, and BARRY HESS, an individual.

Plaintiffs,

vs.

JANICE K. BREWER, Governor of the State of Arizona,

Defendant.

Case No. 2:11-CV-00495-ROS-PHX

MOTION TO DISMISS

(Assigned to Chief Judge Roslyn O. Silver)

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INTRODUCTION

In recent years, Governor Janice K. Brewer ("Governor Brewer") issued proclamations declaring May 6 as an Arizona Day of Prayer. *See* First Amended Complaint ("FAC") ¶ 20. Governor Brewer also proclaimed that January 17, 2010 was a Day of Prayer for Arizona's Economy and State Budget (together with the Arizona Day of Prayer proclamations, the "Proclamations"). *Id.* ¶ 21.

Plaintiff Freedom From Religion Foundation, Inc. ("FFRF") and several of its members (collectively "Plaintiffs") have taken offense to the Proclamations, claiming that the Proclamations have resulted in Plaintiffs feeling "as if they were second class citizens." *Id.* ¶ 41. Plaintiffs filed suit, claiming the Proclamations represent a violation of provisions of the United States and Arizona Constitutions and 42 U.S.C. § 1983. *See, generally,* FAC. Plaintiffs' FAC seeks declaratory relief as to the past Proclamations, an injunction prohibiting Governor Brewer from issuing further proclamations regarding prayer, and attorneys' fees incurred in connection with this lawsuit. *See* FAC at 12-13.

Plaintiffs' claims, however, suffer from a fundamental defect – Plaintiffs have alleged no specific and concrete injury arising from the Proclamations. Thus, Plaintiffs lack Article III standing to sue in this Court. Because Plaintiffs lack standing, this case does not present a justiciable case or controversy. Moreover, to the extent Plaintiffs seek a ruling regarding the legality of past proclamations, their claims are moot because the Court cannot provide any meaningful relief regarding the past proclamations. Similarly, Plaintiffs' claims for declaratory relief regarding potential future proclamations are not ripe and therefore any ruling regarding those future proclamations would constitute an advisory opinion. Therefore, pursuant to Federal Rule of Civil Procedure 12(b)(1) and 12(h)(3), this Court should dismiss this lawsuit for lack of subject-matter jurisdiction.[1]

[1] Though Governor Brewer previously filed an Answer in this matter (Dkt. #10), an amended complaint has since been filed. Moreover, a post-answer motion raising lack of subject matter jurisdiction is "properly before the court as a Rule 12(h)(3) suggestion of lack of subject matter jurisdiction." *Augustine v. United States*, 704 F.2d 1074, 1075, n. 3 (9th Cir. 1983).

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BACKGROUND

Plaintiffs consist of seven individuals who reside in Maricopa County, Arizona, FFRF, and a local chapter of FFRF. *See* FAC. ¶¶ 1-10. The individual plaintiffs are described as both nonbelievers in religion or believers in various religions. *Id.* ¶¶ 4-10. FFRF is described as a "membership organization whose purposes are to promote the fundamental constitutional principle of separation of church and state and to educate on matters relating to nontheism." *Id.* ¶ 1.

Plaintiffs claim that the Proclamations "exhort[] the citizens of Arizona to pray." *Id.* ¶ 30. Plaintiffs allege that the Proclamations create "a hostile environment for non-believers, who are made to feel as if they are second class citizens." *Id.* ¶ 41. Plaintiffs further allege that they are "molested by these unwanted exhortations to pray and the resulting government-sanctioned celebrations of religion . . . ." *Id.* ¶ 44. The Proclamations also somehow allegedly interfere with Plaintiffs' "rights of personal conscience." *Id.* ¶ 48. Plaintiff FFRF claims that the Proclamations "frustrat[e] FFRF's mission to keep separate church and state." *Id.* ¶ 46.

Conspicuously absent from Plaintiffs' FAC is any allegation that the Proclamations caused Plaintiffs any actual specific harm. Instead, they merely claim a general feeling of "offense" and alleged interference with FFRF's mission.

LEGAL STANDARD

"Article III of the Constitution limits the judicial power of the United States to the resolution of 'Cases' and 'Controversies', and 'Article III standing . . . enforces the Constitution's case-or-controversy requirement.'" *Hein v. Freedom From Religion Found., Inc.*, 551 U.S. 587, 597-98 (2007) (citation omitted). "'[O]ne of the controlling elements in the definition of a case or controversy under Article III' is standing." *Id.* (citation omitted).

"[T]he irreducible constitutional minimum of standing," *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), requires that a plaintiff show that:

> (1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 180–81 (2000). "Strict[] adherence" to these requirements is necessary where a plaintiff requests a court to decide whether action taken by one of the other two branches of government is unconstitutional. *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004).

The plaintiff bears the burden of establishing these requirements at every stage of the litigation, as it does for "any other essential element of the case." *Cent. Delta Water Agency v. United States*, 306 F.3d 938, 947 (9th Cir. 2002). If a plaintiff fails to establish standing to assert a claim, then the federal court lacks subject matter jurisdiction over that claim and the claim should be dismissed in its entirety pursuant to Federal Rule of Civil Procedure 12(b)(1). *See Chandler v. State Farm Mut. Auto. Ins. Co.*, 598 F.3d 1115, 1122 (9th Cir. 2010) ("Because standing and ripeness pertain to federal courts' subject matter jurisdiction, they are properly raised in a Rule 12(b)(1) motion to dismiss.").

To survive a motion to dismiss for lack of standing, a plaintiff must allege facts in its complaint that, if proven, would confer standing upon them. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136, 1140 (9th Cir. 2003). Thus, to determine whether Plaintiffs have Article III standing in this case, the Court should examine the FAC to determine if it identifies an injury that is both "(a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical." *See Sacks v. Office of Foreign Assets Control*, 466 F.3d 764, 771 (9th Cir. 2006).

ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING.

A. The Issuance Of A Proclamation That Can Be Ignored Does Not Confer Standing.

In considering whether FFRF and its members had standing to sue regarding President Obama's proclamation related to the National Day of Prayer, the Seventh

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Circuit recently recognized that "[n]o one is injured by a request that can be denied."[2] *See Freedom From Religion Found., Inc. v. Obama, et al.*, 641 F.3d 803, 806 (7th Cir. 2011).[3] The Seventh Circuit aptly observed that:

> [A]lthough this proclamation speaks to all citizens, no one is obliged to pray, any more than a person would be obliged to hand over money if the President asked all citizens to support the Red Cross and other charities. It is not just that there are no penalties for noncompliance; it is that disdaining the President's proclamation is not a "wrong."

Id. The Seventh Circuit concluded that President Obama's issuance of a proclamation related to the National Day of Prayer did not confer standing upon FFRF or its members. *Id.* at 808;[4] *see also Freedom From Religion Found., Inc. v. Texas Governor Rick Perry*, ___F. Supp. 3d___, 4:11-CV-02585, 2011 WL 3269339 (S.D. Tex. July 28, 2011) (dismissing case brought by FFRF regarding Texas Governor's promotion of a prayer rally for lack of standing).

Similarly, Governor Brewer's Proclamations did not force Plaintiffs to take any action. *See* FAC. Ex. 4, 6 and 7. No one is obliged to pray and there are no penalties for failing to do so.[5] Thus, the Proclamations alone are insufficient to confer standing to Plaintiffs.

B. Plaintiffs Fail To Articulate Any Injury Sufficient To Prove That They Have Standing.

Perhaps realizing that the issuance of the Proclamations alone is insufficient to

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[2] This decision explicitly overruled the Western District of Wisconsin's order attached as Exhibit 3 to Plaintiffs' FAC.

[3] Freedom From Religion Foundation, Inc. filed a petition for rehearing en banc of the Seventh Circuit's decision, which was denied on June 16, 2011. *See* Ex. A.

[4] For the Court's convenience, the *Freedom From Religion Foundation* decision was attached in its entirety to Governor Brewer's Answer. (Dkt. #10-1).

[5] Indeed, governors have historically issued proclamations related to a wide variety of subjects that require nothing of the citizenry. For example, when former Governor Hull proclaimed "Elevator and Escalator Safety Awareness Week," and "Jump Rope for Heart Day," *see McDonald v. Thomas*, 202 Ariz. 35, 44, 40 P.3d 819, 828 (2002), it did not compel Arizona's citizens to be especially careful on escalators, nor did it force them to jump rope. Similarly, the Proclamations at issue here are free to be ignored and require no action by Arizona citizens. For this reason, at least one District Court has held that "proclamations, without more, do not present the type of governmental action that encroaches upon First Amendment establishment prohibitions." *Zwerling v. Reagan*, 576 F.Supp 1373, 1378 (C.D. Cal. 1983).

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establish Plaintiffs' standing, Plaintiffs attempt to articulate some injury or harm that they suffered as a result of the Proclamations. However, the "injury" that Plaintiffs articulate is not sufficiently particularized, concrete, or personal to confer standing.

1. Plaintiffs Do Not Allege Any Alteration Of Conduct Based On The Proclamations.

Plaintiffs' FAC alleges that the Proclamations have injured Plaintiffs in the following ways:

- By creating "a hostile environment for non-believers, who are made to feel as if they are second class citizens." *See* FAC. ¶ 41.
- By causing Plaintiffs to feel "molested by these unwanted exhortations to pray and the resulting government-sanctioned celebrations of religion . . ." *Id.* ¶ 44.
- By interfering with Plaintiffs "rights of personal conscience." *Id.* ¶ 48.
- By "frustrating FFRF's mission to keep separate church and state." *Id.* ¶ 46.
- By "requiring [FFRF's] dedication of corrective resources and time . . ." *Id.*

No other facts are pled in the FAC that articulate the nature of harm that Plaintiffs have allegedly suffered as a result of the Proclamations.[6]

Importantly, Plaintiffs fail to articulate any specific action or expense that they have incurred as a result of the Proclamations. Without such an allegation, Plaintiffs lack standing in this matter. *See Freedom From Religion Found., Inc.*, 641 F.3d at 808 (ordering dismissal of plaintiffs' complaint challenging Presidential proclamations regarding a National Day of Prayer because "Plaintiffs have not altered their conduct one whit or incurred any cost in time or money. All they have is disagreement with the President's action.").

[6] Indeed, a review of the FAC reveals that no Plaintiff has even alleged they were directly exposed to the Proclamations. This fact alone is fatal to Plaintiffs' claims because "[s]tanding to challenge invocations as violating the Establishment Clause has not previously been based solely on injury arising from mere abstract knowledge that invocations were said." *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 497 (5th Cir. 2007).

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2. The Individual Plaintiffs' Perceived Slight Or Feeling Of Offense Resulting From The Proclamations Are Insufficient To Establish Standing.

The individual plaintiffs' purported injuries amount to nothing more than generalized allegations that they disagree with the Proclamations, that they are offended by the Proclamations, and that the Proclamations caused them and others to feel excluded or unwelcome. This is not enough to confer Article III standing upon them.

The Supreme Court has long held that a perceived slight or feeling of exclusion is insufficient to grant standing. In *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), the Supreme Court considered an Establishment Clause claim brought by plaintiffs who complained when a federal agency donated surplus property to an educational institution that was supervised by a religious order. *Id.* at 464. The Court held that persons who objected to the transfer lacked standing, because the transfer did not injure them.[7] *Id.* at 486-87. The Court concluded that:

> [Plaintiffs] fail to identify any personal injury suffered by them as a consequence of the alleged constitutional error, other than the psychological consequence presumably produced by observation of conduct with which one disagrees. That is not an injury sufficient to confer standing under Art. III, even though the disagreement is phrased in constitutional terms.

Id. at 485; *see also Allen v. Wright*, 468 U.S. 737, 755, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984) (noting that "abstract stigmatic injury" is insufficient by itself to create Article III injury in fact); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 223 n.13 (1974) ("abstract injury in nonobservance of the Constitution" is insufficient to confer Article III injury); *Human Soc'y of United States v. Babbitt*, 46 F.3d 93, 98 (D.C. Cir. 1995) ("[G]eneral emotional 'harm,' no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes.").

[7] For similar reasons, Plaintiffs lack standing to challenge the Proclamations under Article II, Section 12 of the Arizona Constitution, which addresses appropriating public money for religious worship.

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Two recent Ninth Circuit decisions have confirmed the bedrock principle of law that general offense is insufficient to impart standing. In *Newdow v. Rio Linda Union Sch. Dist.*, 597 F.3d 1007 (9th Cir. 2010), the Ninth Circuit approved of the trial court's ruling that certain atheists lacked standing to argue that Congress's addition of "under God" to the Pledge of Allegiance violated the Establishment Clause. *Id.* at 1016-17. The Ninth Circuit noted that the "[p]laintiffs are unable to show the 1954 amendment causes them to suffer any concrete and particularized injury because nothing in the Pledge actually requires anyone to recite it." *Id.* at 1016. "Instead . . ., plaintiffs would, at most, be asserting 'generalized grievances more appropriately addressed in the representative branches', which do not confer standing." *Id.* (citation omitted). Similarly here, the Proclamations do not require anyone to pray, and, despite Plaintiffs' "generalized grievances," they do not possess Article III standing.[8]

In a related case decided the same day, the Ninth Circuit held that other plaintiffs lacked standing to bring an Establishment Clause challenge to 36 U.S.C. § 302, "which merely recognizes 'In God We Trust' as the national motto." *Newdow v. Lefevre*, 598 F.3d 638, 643 (9th Cir. 2010) (footnote omitted). Although the plaintiffs there alleged that the national motto "turns Atheists into political outsiders and inflicts a stigmatic injury upon them," the Ninth Circuit ruled that "an 'abstract stigmatic injury' resulting from such outsider status is insufficient to confer standing." *Id.* (citation omitted). The plaintiffs' mere awareness of the motto statute did not provide the kind of "unwelcome direct contact" that can give rise to Article III injury-in-fact. *Id.*

Here, because the individual plaintiffs' alleged injury is merely stigmatic and not concrete or particularized, the individual plaintiffs have failed to establish that they have

[8] Moreover, the plaintiffs in the *Rio Linda* case were directly and repeatedly exposed to the pledge of allegiance. *See Rio Linda*, 597 F.3d at 1012. Yet the Ninth Circuit still held that the *Rio Linda* plaintiffs did not plead sufficient injury to establish standing. *Id.* at 1016. Here, Plaintiffs exposure to the Proclamations is attenuated, at best, and therefore falls well short of establishing any concrete or particularized injury sufficient to establish Article III standing.

Article III standing. Thus, the individual plaintiffs' claims must be dismissed in their entirety.

3. FFRF Lacks Both Direct And Representational Standing.

FFRF fares no better than the individual plaintiffs in its effort to allege standing. "Our decisions make clear that an organization's abstract concern with a subject that could be affected by an adjudication does not substitute for the concrete injury required by Art[icle] III." *Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 40 (1976). Instead, organizations claiming direct injury must satisfy the same standing test as individuals by suffering from a concrete injury that is fairly traceable to the defendants' conduct. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *see also Nat'l Treas. Emps. Union v. United States*, 101 F.3d 1423, 1429 (D.C. Cir. 1996) ("We, of course, recognize that conflict between a defendant's conduct and an organization's mission is alone insufficient to establish Article III standing. Frustration of an organization's objectives 'is the type of abstract concern that does not impart standing.'") (citation omitted).

To that end, "ordinary expenditures as part of an organization's purpose do not constitute the necessary injury-in-fact required for standing." *Plotkin v. Ryan*, 239 F.3d 882, 886 (7th Cir. 2001); s*ee also Fla. State Conference of NAACP v. Browning*, 522 F.3d 1153, 1166 (11th Cir. 2008) ("[P]laintiffs cannot bootstrap the cost of detecting and challenging illegal practices into injury for standing purposes."); *see also Fair Emp't Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994) (rejecting argument that "an organization devoted exclusively to advancing more rigorous enforcement of selected laws could secure standing simply by showing that one alleged illegality had 'deflected' it from pursuit of another"). To properly plead a concrete injury, an organization must do more than allege "damage to an interest in 'seeing' the law obeyed or a social goal furthered." *Nat'l Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995).

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To allow FFRF's claim to proceed would essentially eviscerate the courts' current concept of standing. Indeed, if an organization could obtain standing merely by expending resources in response to a government action, then Article III standing could be obtained through nothing more than bearing the expense of filing a lawsuit. Such an interpretation would run contrary to decades of carefully-developed standing principles.

The FAC alleges no concrete or particularized injury suffered by FFRF. *See, generally*, FAC. On the contrary, FFRF's allegations that the Proclamations adversely affect its ability to "carry out its organizational mission in the State of Arizona to keep church and state separate," and that the Proclamations "require the dedication of corrective resources and . . . frustrate the accomplishment of FFRF's mission to keep separate church and state," FAC. ¶ 46, merely reflect FFRF's abstract concern with "the Constitutional principle of separation of church and state and . . . educat[ion] on matters relating to nontheism," FAC. ¶ 1. FFRF's generalized grievance is not sufficient to meet its burden of establishing FFRF's direct standing. *See Plotkin*, 239 F.3d at 886; *Nat'l Taxpayers Union, Inc.*, 68 F.3d at 1433.

Nor does FFRF have representational standing. An organization has representational standing to sue if: (1) at least one of its members would otherwise have standing; (2) the interests at stake in the litigation are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires an individual member's participation in the lawsuit. *See Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). But FFRF's allegations fail to meet the requirements of the first element of the test because FFRF's individual members lack standing. *See* Part I.B.2, *supra*. Thus, FFRF lacks representational standing to assert the grievances of its members.

4. The Court Should Take Guidance From The Seventh Circuit's Recent Ruling That FFRF And Its Members Lacked Standing To Challenge A Proclamation Regarding A National Day of Prayer.

Closely tracking the reasoning manifest by the Ninth Circuit in *Rio Linda* and *Lefevre*, the Seventh Circuit recently ruled that FFRF and its members lacked Article III

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standing to bring a lawsuit related to a Presidential proclamation regarding a National Day of Prayer. *See Freedom From Religion Found., Inc.*, 641 F.3d at 808. There, the Seventh Circuit observed that "offense at the behavior of the government, and a desire to have public officials comply with (plaintiff's view of) the Constitution, differs from legal injury." *Id.* at 807. The Seventh Circuit noted that, "unless all limits on standing are abandoned, a feeling of alienation cannot suffice as injury in fact." *Id.* at 808. Simply stated, "[t]he psychological consequence presumably produced by observation of conduct with which one disagrees is not an injury for the purpose of standing." *Id.* at 807-08 (internal citations and quotation marks omitted).

A similar result is mandated here. Neither the individual plaintiffs nor FFRF has articulated any injury sufficient to establish Article III standing to pursue their current claims regarding Governor Brewer's Proclamations. Thus, Plaintiffs' claims should be dismissed in their entirety because this Court lacks subject matter jurisdiction.

II. PLAINTIFFS' DECLARATORY RELIEF CLAIMS ARE MOOT AND/OR SEEK AN ADVISORY OPINION.

Among the relief Plaintiffs seek is a judgment declaring that the Proclamations violate the Establishment Clause of the United States Constitution and the Arizona Constitution. *See* FAC at 12. To the extent Plaintiffs seek such a declaration regarding any past Proclamations, such a claim is moot. This Court cannot provide any meaningful relief regarding the proclamations that took place in January 2010, April 2010, or April 2011. *See* FAC ¶ 20-21. Those proclamations have already been disseminated; they cannot now be "undone."

In addition to seeking a declaration that the past Proclamations were unconstitutional, Plaintiffs' FAC seeks an injunction prohibiting Governor Brewer from "proclaiming any day of prayer in 2012 and thereafter." *See* FAC at 12. This Court cannot grant the requested relief.

First, it is not clear whether Governor Brewer will issue a prayer day proclamation in the future. Plaintiffs' injury allegations in this regard are therefore entirely

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hypothetical. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105-110 (1983). Moreover, assuming that Governor Brewer were to issue a prayer day proclamation in the future, this Court cannot begin to predict the substance of that proclamation. This was precisely the issue faced by the District of Columbia Court in *Newdow v. Bush* in the very similar context of inaugural prayers. There, the court found that it "cannot now rule on the constitutionality of prayers yet unspoken at future inaugurations of presidents who will make their own assessments and choices with respect to the inclusion of prayer." *Newdow v. Bush*, 391 F. Supp. 2d 95, 108 (D.D.C. 2005); see also *Lyons*, 461 U.S. at 105-110.

In this case, the Court would have to speculate on the content of any potential future prayer proclamations by Governor Brewer. This Court cannot issue an injunction regarding such an "abstract proposition[ ]" or it will run afoul of the case or controversy requirement of Article III. *Protestant Mem'l Med. Ctr. v. Maram*, 471 F.3d 724, 729 (7th Cir. 2006).

CONCLUSION

For the above-stated reasons, Governor Brewer respectfully requests that this Court dismiss Plaintiffs' claims.

RESPECTFULLY SUBMITTED this 13th day of September, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2011, I electronically transmitted the attached document to the Clerk's Office using the CM/ECF System for filing and transmittal of a Notice of Electronic Filing to the CM/ECF registrants on record.

/s/ Rosalin Sanhadja

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